

No. 10251.

IN THE

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United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

PETITION FOR REHEARING.

LESLEY B. ALLEN,
Mayflower Hotel, Los Angeles,
Attorney for Appellee.

FILED

JUL 12 1943

PAUL P. O'BRIEN,
CLERK

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*To the United States Circuit Court of Appeals for the
Ninth Circuit:*

Comes now the said appellee, petitioning for rehearing of the above entitled cause, and represents to the court the following:

I.

That the said cause was argued upon the merits, subject to the determination of the trial court's jurisdiction, and was submitted to this court on or about February 12, 1943.

II.

That on April 19, 1943, judgment was entered by such Circuit Court in such cause, reversing and remanding the same because of the fact that said appellee had defectively alleged the diversity of citizenship of the said parties.

III.

That no amendment was proffered at the time of such argument.

IV.

That appellee thereafter moved for leave to amend, in order to properly plead diversity of citizenship, as well as diversity of residence, of the said parties.

V.

That such motion was denied by this court; and time for the filing of petition for rehearing was extended.

VI.

That, as appears from affidavits now on file herein, the diversity of citizenship of the parties actually existed at the time this action was filed in the trial court and the trial of such cause was therein conducted and judgment thereby entered on the theory that diversity of citizenship of such parties did exist.

VII.

That the decision and judgment of this court did not take into account the merits of the case; did not dispose of any of the issues raised upon this appeal; and reversed and remanded only on the finding that jurisdiction of the trial court had neither been alleged nor shown.

VIII.

That such jurisdictional point had not been raised by appellants; and first came to light when members of this court questioned counsel at the time of the argument of the cause on appeal.

IX.

That notwithstanding the court's decision that said appellee is not entitled to amend in this appellate court, a rehearing and a deciding of the issues raised on the appeal would be in keeping with the desire of this court to do substantial justice, where possible, and to avoid multiplicity of trials and appeals.

X.

That appellee believes and submits that decision of the issues raised on appeal, subject to proper allegation and proof of the existing diversity of citizenship, should be had for the following reasons, to-wit:

a. That, by statute, the appellee is entitled to amend in order to properly allege diversity of citizenship; and

b. That, if the cause is remanded only upon the present opinion and judgment of the court, amendment and proof of diversity of citizenship may be had without the parties, the trial court or this court knowing what disposition of the case upon its merits may be or should be ultimately made by this court; but

c. That if this court rehears and decides the issues of the appeal in favor of the appellee, then the cause may be remanded with directions that the judgment of the trial court shall stand in the event that appellee shall amend his pleadings and make proper proof of the facts relative to diversity of citizenship; or

d. That, should this court rehear and decide the issues on appeal in favor of the appellants, the cause may then be remanded for new trial on its merits as well as on the issue of diversity of citizenship; and

e. That rehearing and consideration of and ruling upon the issues raised on appeal would advise the parties

as to the merits of their respective contentions on appeal and could well result in a final disposition of the case by settlement and without further proceedings and expense, whereas, on the other hand and upon reversal and remand only on the jurisdictional point, the lack of decision on the merits could well result in the following proceedings, namely:

Further proceedings in the trial court on the issue of diversity of citizenship;

Further appeal to this court on the very same issues which are now before it on this appeal; and

Ultimate reversal and remand on one or more of such issues,

all before the parties might be in position to consider their respective positions in light of appellate determination of the issues which have been raised on this appeal.

XI.

That the case has been argued on its merits; and that rehearing can be had without the necessity of further argument.

Wherefore, the said appellee prays that said cause be reheard and considered upon its merits; prays that all of the issues on appeal be considered and adjudicated; and prays that proper judgment and mandate be made, entered and issued in such cause, to permit amendment of the pleadings, proper proof thereunder and final disposition of the cause in light of this court's disposition of the issues raised on this appeal.

LESLEY B. ALLEN,
Attorney for Appellee.

State of California, County of Los Angeles—ss.

Lesley B. Allen, being first duly sworn according to law, deposes and says: That he is attorney of record for Edward J. Donovan, appellee herein; that he has prepared the foregoing Petition for Rehearing and knows the contents thereof; that such petition is well founded and that such petition is not interposed for delay.

LESLEY B. ALLEN.

Subscribed and sworn to before me this 9th day of July, 1943, by Lesley B. Allen.

F. GEORGE HERLIHY,
Notary Public.

My commission expires Jan. 27, 1944.

